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No. 185

In the

Supreme Court of the United States

OCTOBER TERM, 1961

MIDESSA TELEVISION COMPANY, INC.,
Petitioner,

v.

MOTION PICTURES FOR TELEVISION, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Midessa Television Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on May 17, 1961.

A.

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Rec. 128-131) is not yet reported; it is attached as Appendix A. The judgment of said court is attached as Appendix B.

The judgment and decree of the District Court for the Western District of Texas, unreported, is dated September 13, 1960 (Rec. 115-116). There was no written opinion by the Judge of the District Court.

B.

JURISDICTION

The judgment of the United States Court of Appeals was entered on May 17, 1961 (Rec. 132).

On June 2, 1961, on application it was ordered that the issue of the mandate of the court be stayed until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of the order there should be filed with the cleark of the Court of Appeals the certificate of the clerk of the Supreme Court that certiorari petition and record had been filed (Rec. 137).

The jurisdiction of this Court is invoked under subdivision (1) of Section 1254 of Title 28 of the United States Code and subdivision (b) of Section 1 of Rule 19 of the Supreme Court Rules, because the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this

Court and it has rendered a decision in conflict with the decision of another Court of Appeals on the same matter. The case actually presents a substantial question under the full faith and credit clause (Art. IV, §1) of the Constitution of the United States.

C.

QUESTIONS PRESENTED FOR REVIEW

1. Whether in an action on a judgment of a court of a sister state the full faith and credit clause of the Federal Constitution precludes an attack on the judgment by pleading and proof that it was procured by fraud, where the court rendering the judgment had jurisdiction of the defendant and the subject matter?

2. Whether a judgment obtained, without an actual adversary trial, upon what was fraudulently represented to the court as an award of arbitrators, may be attacked for such fraud when the same fraud would have been a defense in an action brought upon the judgment in the state in which it was rendered?

3. Whether fraud in the procurement of a judgment from a New York court upon the representation that there had been an award of arbitrators fixing the amount of the debt and the judgment, when in truth and fact there had not been such an award, was such fraud that it would have been a defense in an action brought upon the judgment in another New York court?

D.

THE STATUTE AND CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

Article IV, §1 of the Constitution provides that, "Full Faith and Credit shall be given in each state to the public Acts, Records, and Judicial Proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Congress by the Act of May 26, 1790, c. 11, as amended, R.S. §905, 28 U. S. C. §687, 28 U. S. C. A. §687, declared that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

E.

STATEMENT

Respondent, Motion Pictures for Television, Inc., sued petitioner, Midessa Television Company, Inc., in the United States District Court for the Western District of Texas, Pecos Division, upon a judgment of a New York court. Jurisdition of the Federal court was invoked solely because of diversity of citizenship, the respondent being a New York corporation and petitioner being a Texas corporation (Rec. 2).

The judgment sued upon by respondent was a judgment of a New York court, signed by a clerk, which recited that the controversy between the parties had been "submitted to

arbitration" and the arbitrators "having duly proceeded in the matter and an award having been duly made, signed and acknowledged" the respondent should recover the sum of $20,626.75, with interest, for a total of $20,935.75 (Rec. 1-4, 111). No evidence was introduced in court, no adversary trial was had, the clerk merely made formal entry of the "judgment" on the representation of respondent that the matter and questions in controversy had been settled by the award of the arbitrators, all as shown on the face of the judgment, copy of which is attached as Appendix D.

There was no arbitration and award of arbitrators upon which the judgment was rendered. There was an award of arbitrators but it was for only $4,251.51, plus interest of $715.67, plus administrative fees of $488.45, for a total of $5,455.63, as shown in the award itself, copy of which is attached as Appendix C.

The award of the arbitartors is shown in respondent's affidavit attached to its Motion for Summary Judgment, the stipulation of the parties, and the exhibits (Rec. 36, 53, 103). The controversy had been submitted to arbitrators and they "duly heard the proofs and allegations of Motion Pictures for Television, Inc." and set the amount as $5,455.63. Respondent did not go back to the arbitrators with the claim that they had made a mistake or that there had been some kind of miscalculation of figures. Respondent took no further notice of its claimed agreement for arbitration by arbitrators. There was no other hearing, trial or arbitration by the arbitrators.

Respondent merely filed a motion requesting the New York court to change the figures and disregard the arbitrators' award and upon the fraudulent representation that there had been an award of arbitrators justifying it, secured a judgment from the New York court for the $20,935.75 (App. D).

In fact, there was a written agreement of June 3, 1954, in which respondent agreed to deliver to petitioner positive, synchronized prints of certain particularly designated pictures physically suitable for exhibition on television. This was a general contract for the showing of many designated films, with petitioner agreeing to pay for a contracted minimum of film programming, and with respondent agreeing to refrain from contracting for any such listed film with any other television station in the area until two years following the date of the contract. A second and separate contract was entered into on the same day, but this was a particular contract for a comparatively small number of specified films, and it did not contain the general provisions for the showing of many films on a contracted minimum basis as provided in the first agreement (Rec. 40-45).

These two agreements were signed by petitioner in Texas. They were to be performed in Texas with shipment of the films to Midland, Texas. Respondent shipped some of the films, and petitioner attempted to use them, but they were torn, old and unusable. Petitioner discontinued the use of the films and notified respondent that it would not pay for any additional films and no such additional films should be shipped. The two agreements contained a provision that all disputes should be submitted to arbitration under the rules

and regulations of the American Arbitration Association. Respondent insisted upon such arbitration, but petitioner declined to arbitrate on the ground that such agreement was against the public policy of the State of Texas and unenforceable. Respondent insisted upon continuing with the arbitration, had arbitrators named, and submitted the matter to such arbitrators. The arbitrators made their award of $5,455.63. Respondent was not satisfied with such award. Without going back to the arbitrators and without further proof save and except its own statement, respondent fraudulently and wrongfully had the amount raised to $20,935.75. Respondent secured the judgment from the New York court on the fraudulent representation that such amount had been fixed by the arbitrators. These facts are developed in the sworn Reply of petitioner to respondent's Motion for Summary Judgment (Rec. 40-45).

In addition to defending against the New York judgment, petitioner filed a counterclaim, pleading that under the agreements respondent had agreed to deliver prints of pictures in all respects physically suitable for exhibition, which prints and pictures were actually unsuitable and could not be used; that it had attempted to use some of the pictures and paid respondent the sum of $9,717.86, and by reason of respondent's failure to perform its contract and ship suitable pictures, petitioner had been damaged in the sum of $35,000.00 (Rec. 11-18).

Upon respondent's Motion for Summary Judgment, and denying petitioner its right to submit the question to a jury, the District Court rendered a summary judgment for re-

spondent for $20,935.75, with interest at the rate of 6% per annum from July 21, 1958 until the judgment should be paid and satisfied (Rec. 115-116).

From the District Court's judgment, petitioner brought its appeal to the Court of Appeals for the Fifth Circuit. The appellate court disregarded petitioner's sworn Reply to the Motion for Summary Judgment. The court held, first, that the sole point of inquiry was whether the New York court had jurisdiction; second, that a ground of fraud could not be pleaded in the action in Texas on the judgment obtained in New York; and third, the complained of representation to the New York Court did not constitute fraud (Rec. 128-131; App. A).

F.

REASONS FOR THE ALLOWANCE OF THE WRIT

1. The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court and the decision of another Court of Appeals on the same matter.

The Court of Appeals has said and held that, "While a distinction is made between extrinsic and intrinsic fraud, this becomes irrelevant on a collateral attack of a judgment after it is determined that the court had jurisdiction. The matter of jurisdiction is the sole point of inquiry. On this premise of jurisdiction, the courts have held that a ground of fraud cannot be pleaded in an action in one state on a judgment obtained in another."

This is in direct conflict with the law set forth by this Court in *Cole v. Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 L. Ed. 538.* After quoting the full faith and credit clause of the Constitution and the act of Congress providing the mode of authenticating the acts, records and judicial proceedings of the states, this Court declared:

> "This does not prevent an inquiry into the jurisdiction of the court in which a judgment is rendered to pronounce the judgment, nor into the right of the state to exercise authority over the parties or the subject-matter, *nor whether the judgment is founded in, and impeachable for, a manifest fraud.*"

This holding of the Court of Appeals is in direct conflict with the statement of this Court in *Morris v. Jones, 67 S. Ct. 451, 329 U. S. 545*, to-wit:

> "Second. 'A judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata, *in the absence of fraud* or collusion, even if obtained upon a default.' Riehle v. Margolies, supra, 279 U. S. at page 225, 49 S. Ct. at page 313, 73 L. Ed. 669."

This holding of the Court of Appeals for the Fifth Circuit is in direct conflict with the holding and decision of the Court of Appeals for the Third Circuit in *Headen v. Pope & Talbot, Inc., 252 F. 2d 739.* In the trial of the case in the United States District Court for the Eastern District of Pennsylvania, a judgment of a South Carolina court was offered in evidence. In speaking of the South Carolina judgment, the Court of Appeals for the Third Circuit said:

> "It was further contended by the defendant at the trial that both the decree and Benton's petition upon which it was based were procured by overreaching and fraud

> Allegations of defendant, if true, cast serious reflections upon tactics of counsel, and may even involve a question of legal ethics. Plaintiff emphatically denied that the petition and decree were obtained by fraud. *The question of fraud should be left to the jury*, and if defendant's version is believed, the jury should be instructed to disregard the petition and the decree."

These statements of the appellate court appear in direct conflict with the statements made by the same court in *O'Boyle v. Beril, 259 F. 2d 506, cert. den., 79 S. Ct. 590, 359 U. S. 913, 3 L. Ed. 2d 576.* For the majority, Judge Tuttle declared:

> "We next come to the merits of the attack on the two judgments. Questions as to the setting aside of judgments are difficult at best. This difficulty is increased when attack is made in a federal court on a state court judgment. There is one principle, however, that stands out clearly in this area of controversy. That is that *in diversity cases*, a federal court may set aside a state court judgment for equitable grounds that are recognized by the state as a basis for such action. *When, as is true in Texas, a judgment can be set aside* for want of jurisdiction *or for fraud*, the federal court exercising its equity jurisdiction, can act similarly in a diversity case."

In voting with Judge Tuttle, Judge Cameron specially concurred and declared:

> "It is my conviction that any court of competent jurisdiction, either state or federal, can adjudge the merits of any suit involving the validity of a final judgment of any other court, state or federal, where the basis for the attack is that the court rendering the questioned judgment did not have jurisdiction to render it, *or that such judgment was procured by fraud.*

"In White v. Union Producing Co., 5 Cir., 1944, 140 F. 2d 176, at page 178, we stated:

"'Fraud vitiates everything it touches, it is difficult to define; there is no absolute rule as to what facts constitute fraud; and the law does not provide one "lest knavish ingenuity may avoid it."'

"A judgment obtained by fraud is a nullity. To establish the fraud as well as the want of jurisdiction to render the judgment for failure to observe the requirements of the state statutes, the court in which the judgment is brought in question may consider the entire record in the case, pleadings, process and evidence, and may, in proper cases, consider extrinsic evidence."

The prior decisions of this Court and the Courts of Appeals are in line with the statement of the rule made in the *American Law Institute, Restatement of the Law, Conflict of Laws, Section 110.* In that authority it is stated:

"A valid foreign judgment for the payment of money which was obtained by fraud will not be enforced if

(a) equitable defenses may be interposed in an action at law at the forum, and

(b) the fraud was of a character such as to constitute grounds for equitable relief in the state where the judgment was rendered."

The use of fraud as a defense to an action on a judgment of a sister state is exhaustively briefed in *55 A. L. R. 2d 673, et seq.* It is there stated that the general rule derived from a proper analysis of the cases is that the full faith and credit clause does not preclude the defense, in an action on the judgment of a sister state, that the judgment was obtained by fraud, where the same defense, under the facts upon which it is predicated, is available in an action upon a

domestic judgment brought in the state in which the judgment was rendered. It does not require that the judgment of a sister state be given a more conclusive or final effect than it has in the state where rendered. *New York Ex rel Halvey v. Halvey, 67 S. Ct. 903, 330 U. S. 610, 91 L. Ed. 1133.* If judgments rendered in a sister state are not immune in that state from impeachment for fraud, they cannot be held immune from similar attacks when sued upon in another state, because otherwise greater faith and credit would have to be given them in the state in which they are sued upon than is accorded to them in the state in which the judgment was rendered, and this is not the meaning of either the Constitution or the act of Congress. *Hare v. Reilly, 269 S. W. 473, 280 S. W. 543; Krummen v. Still, 146 S. W. 2d 288; Prime v. Hinton, 244 App. Div. 181, 279 N. Y. S. 37; White v. Reid, 70 Hun. 197, 24 N. Y. S. 290.*

Since the Court of Appeals did not follow the law as previously recognized and announced by this Court and other Courts of Appeals and the appellate courts of the various states, a typical situation is presented in which this Court has on numerous occasions granted writs of certiorari. *Fourco Glass Company v. Transmirra Products Corporation, 77 S. Ct. 787, 353 U. S. 222, 1 L. Ed. 2d 786; Magnum Import Co. v. Coty, 43 S. Ct. 531, 262 U. S. 159, 67 L. Ed. 922; Gay v. Ruff, 54 S. Ct. 608, 292 U. S. 25, 78 L. Ed. 1099; Rogers v. Quan, 78 S. Ct. 1076, 357 U. S. 193, 2 L. Ed. 2d 1252.*

2. The decision of the Court of Appeals is not in accord with the applicable decisions of the appellate courts of New York where the judgment sued upon was rendered.

The Court of Appeals has held that, even if the matter could be gone into, the making of the representation by respondent in obtaining the New York judgment that such judgment should be entered for $20,935.75 on an arbitrators' award (where there was no such award) was not fraud. The court has limited this concept of "fraud" solely to that which prevented a trial of the issues between the parties.

First, that the representation made by respondent was fraudulent and was the means by which respondent avoided an adversary trial and secured the wrongful judgment has been pleaded and affirmed by petitioner. This was then a fact issue. It was a good faith issue of fact raised by petitioner. Since there was such good faith issue of fact, the summary judgment could not have been granted on that basis. *Sartor v. Arkansas Natural Gas Corp., 64 S. Ct. 724, 321 U. S. 620, 88 L. Ed. 967; Westinghouse Electric Corp. v. Bulldog Electric Products Co., 179 F. 2d 139.* Even though there be some doubt as to the existence of the defense, the party asserting it in good faith is entitled to a trial of the issue. *Arnstein v. Porter, 154 F. 2d 464; Hartford Accident & Indemnity Co. v. Northwest Nat. Bank of Chicago, 228 F. 2d 391; 10 Cyclopedia of Federal Procedure 179, 181, Judgments and Decrees § 35.19.*

It then follows that this refusal to give effect to such fraud is in direct conflict with the law of New York, where it is held that, (a) equitable defenses may be interposed to

a judgment obtained in an action at law, and (b) the fraud is of a character such as to constitute grounds for equitable relief if it be part of the means actually employed in obtaining the prior judgment.

The New York courts have held that the prior judgment cannot be set aside where the fraud relates wholly to the cause of action tried but that such a judgment can be attacked on fraud connected with the means employed in obtaining that judgment. *In Re Kimball's Estate, 155 N. Y. 62, 49 N. E. 331; Mayor, Etc. of New York v. Brady, 115 N. Y. 599, 22 N. E. 236.* The fraud to be available in the New York courts must be something connected with the mode of trying and deciding the prior action. *Boston & M. R.R. v. Delaware & H. Co., 264 N. Y. S. 470, reversing 260 N. Y. S. 817; Krause v. McVickar, 207 N. Y. 213, 100 N. E. 697.*

In *49 C. J. S. 732, Judgments, §372*, the New York cases of *Arcuri v. Arcuri, 265 N. Y. 358, 193 N. E. 174*, and *Boston & M. R.R. v. Delaware & H. Co., supra*, are cited in support of the general rule that, "A court of equity on a proper application will relieve against, or enjoin a party from enforcing, *a judgment obtained by means of fraud, and especially where the fraud has been imposed or practiced on the court.*" The cases of *Fuhrmann v. Fanroth, 254 N. Y. 479, 173 N. E. 685*, and *Horne v. McGinley, 299 N. Y. S. 1*, and *Scopano v. U. S. Gypsum Co., 3 N. Y. S. 2d 300*, are cited in support of the further statement that, "The rule has frequently been laid down that the fraud must have been in the procurement of the judgment, *and such fraud is sufficient, since it is regarded as perpetrated on the court as well as on the injured party.*"

As said in *30-A Amer. Jur. 725, Judgments, §784, intrinsic* fraud is not sufficient for equitable relief, but fraud has been regarded as *extrinsic* and available where it operated upon matters pertaining to the manner in which the judgment was procured. "Concealment of material facts for the purpose of securing a judgment is a species of fraud which courts of equity have quite uniformly relieved against," is the rule stated in *Boston & M. R.R. v. Delaware & H. Co., supra.*

In fact this appears to have long been the recognized rule in New York as noted in the opinion of this Court in *Cole v. Cunningham, 133 U. S. 112, 10 S. Ct. 269,* where this Court discussed *Dobson v. Pearce, 12 N. Y. 156.* This Court there declared that the judgment of the sister state was impeachable for a manifest fraud, which was well illustrated by the decision of the highest tribunal of New York in the *Dobson v. Pearce* case. As there stated by this Court, in *Dobson v. Pearce* the plaintiff in a judgment, recovered in New York, brought an action upon it in a Connecticut court, whereupon the defendant in the judgment defended on the allegation that the judgment in New York was procured by fraud. In the Connecticut court it was found that the New York judgment was obtained by fraud, and the plaintiff in that judgment was enjoined from prosecuting an action upon it. It was later held in a subsequently filed suit in New York, that the decree of the Connecticut court was conclusive evidence that the first and prior New York judgment was obtained by fraud and not to be enforced. This Court recognized the rule applicable in New York that the prior New York judgment could be attacked for either fraud or imposition.

The representation made by respondent to the New York court was fraudulent. It is to be so treated in this appeal from a summary judgment in favor of respondent. It was a fraud acted upon by the New York court. It was a palpable wrong and imposition on the court itself. The fraud was in itself the means employed in obtaining the judgment for the unconscionable amount. It was the kind of fraud a New York court would recognize and raise as a defense to any action on the prior judgment. *49 C. J. S. 732.*

3. This case presents a substantial question under the full faith and credit clause of the Constitution.

The citizens of this country and their attorneys have relied upon the rule heretofore consistently recognized and enforced by the courts that a judgment of a court can be attacked for fraud in its procurement, that is, fraud connected with the means employed in obtaining the judgment, as well as on the ground of lack of jurisdiction. In reliance upon such rule and the doctrine of stare decisis, parties have refrained from contesting proceedings being had in foreign courts. Litigants and their attorneys have been held to the standard that a judgment obtained by fraud is a nullity and will not be enforced whether suit be brought thereupon in the state where it was obtained or in one or more of the other states. This rule has for these many years assured all parties and their attorneys that the courts of the state of the forum have as much leeway to disregard the foreign judgment, to qualify it, or to depart from it as would any court in the state where it was rendered. This rule is of such great importance that the present opinion of the Court of Appeals for the Fifth Circuit should not be allowed to stand.

CONCLUSION

The constitutional doctrine of full faith and credit does not require that the judgment of the New York court be given such effect that petitioner be denied a trial by jury on the question of fraud which petitioner raised in its answer and counterclaim and its Reply to respondent's Motion for Summary Judgment. To hold otherwise will be to deny petitioner equitable relief from a judgment obtained by fraud by which the New York court has been made an instrument of injustice and which fraud petitioner could have pleaded and tried in a New York court had this present suit been there filed and prosecuted.

Therefore, for the foregoing reasons, petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court as provided by statute and the rules and decisions of this Court, and that the judgment of said Court of Appeals, as well as the judgment of the District Court, be reversed, and for such other and further relief as to this Court may seem proper.

DATED this day of June, 1961.

Respectfully submitted,

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Of Counsel:
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A copy of this petition for writ of certiorari has been served upon the respondent by mail, by depositing a copy of the same in a United States Postoffice, with first-class postage prepaid, addressed to Mr. Frank Bezoni and Mr. Thomas O. McWhorter, of the firm of Perkins, Bezoni, Kirwan & McWhorter, 1012 Midland Savings Building, Midland, Texas, which is the postoffice address of said counsel of record for respondent.

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18737

MIDESSA TELEVISION COMPANY, INC.,
Appellant,

versus

MOTION PICTURES FOR TELEVISION, INC.,
Appellee.

Appeal from the United States District Court for the Western District of Texas.

(May 17, 1961.)

Before TUTTLE, Chief Judge, and HUTCHESON and BROWN, Circuit Judges.

HUTCHESON, Circuit Judge: This is an appeal from a summary judgment granting the appellee—plaintiff below—judgment against the defendant below, and dismissing defendant's counter-claim. The suit was brought to enforce

a judgment of a state court, The Supreme Court of New York, enforcing and amending an award of arbitrators, conducted under New York law, under the provisions of a written agreement between plaintiff and defendant.

Recognizing the general rule, that, in a suit on a judgment of a court of one of the states, full faith and credit requires the enforcement of the judgment unless it is shown that the judgment was entered without jurisdiction, the defendant attacked the judgment on the ground that the court was without jurisdiction to enter the judgment and on the ground that the judgment was based on fraud. This latter defense was based on the claim that the award of the Arbitration Board was for $5455.63, and that it was amended in the New York Supreme Court and a judgment entered for a sum in excess of $20,000.

The stipulated facts and the exhibits show that plaintiff had agreed to the arbitration in accordance with New York law and had also agreed to the jurisdiction of the Arbitration Board and the courts of New York as provided in New York law,[1] and there was no question but that the Arbitration Board and the court had jurisdiction of defendant which had expressly agreed to their jurisdiction. It was also shown without dispute that defendant had been notified in the manner agreed upon of the proceeding filed in the New York court for amendment of the arbitration and had failed to appear at the hearing, despite the notice which was given it.

[1]Article 84, Civil Practice Act, State of New York, Sections 1448, 1450, 1451, and 1462-A.

Plaintiff relied below and relies here on the established rule that in a suit on a judgment of a state court, predicated on proper jurisdiction over the subject matter and person, as was the case here, through the consent thereto of defendant under the full faith and credit clause and the decisions under it, the judgment is not subject to collateral attack. *Ripley Fabrics Corp. v. Hymen*, 91 F. Supp. 1007; *Milliken v. Meyer*, 311 U. S.457; *Morris v. James*, 329 U.S. 545.

In a suit on such a judgment, no defense may be set up which goes to the merit of the original controversy. *Milwaukee County v. M. E. White Co.*, 296 U.S. 268. There is no better settled principle in the law than that a judgment for the merits in one suit is res judicata in another, where the parties and the subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted but also as to any other available matter which might have been presented. *Cromwell v. County of Sac*, 94 U.S. 351; *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316. The defendant, having voluntarily chosen not to assert any defenses in the New York proceeding, is foreclosed from asserting them now. Such matters are res judicata and the New York judgment must be given full faith and credit.

Appellant's complaint that its allegations of fraud should have entitled it to a re-litigation of the New York proceeding are without substance or merit, first because there is no claim presented that the fraud was extrinsic, that is that it prevented a trial of issues determinative of the

controversy, *U.S. v. Throckmorton*, 98 U.S. 61; *Crouch v. McGraw*, 134 Texas 633, 138 SW(2) 94. The appellant had every opportunity to litigate the case in New York. It failed through its negligence or deliberate omission to do so and was not prevented from doing so by any act of appellee, and it may not litigate the issue in a collateral attack upon the judgment. While a distinction is made between extrinsic and intrinsic fraud, *U.S. v. Throckmorton*, *supra*, *U.S. v. Beebe*, 180 U.S. 343, 49 C.J.S., 735, Judgments, Sec. 372(b), this becomes irrelevant on a collateral attack on a judgment after it is determined that the court had jurisdiction. The matter of jurisdiction is the sole point of inquiry. On this premise of jurisdiction, the courts have held that a ground of fraud cannot be pleaded in an action in one state on a judgment obtained in another. *Simmons v. Saul*, 138 U.S. 439. In addition, nothing is stated in the defendant's answer or otherwise shown which would support a claim of fraud even if that could be gone into. As the stipulated facts and the exhibits set out in the record show defendant was notified of and given full opportunity to contest the motion of the plaintiff in the New York Supreme Court to amend the arbitration.

Further, a careful examination of the judgment and the record in respect to the amendment of the arbitration discloses no fact which supports the defendant's claim of fraud. Having consented by solemn agreement to arbitration and to the jurisdiction of the New York courts and laws, in all matters relating to the contract, its validity, and the obligations thereunder, and these having been

determined under New York law, the defendant could have no complaint which would support a collateral attack. "An agreement that all differences arising under contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum." *Meacham v. Jamestown F&CR Co.*, 211 N.Y. 346, 105 N.E. 653. This rule is well settled in *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, and *Marine Transport Corp. v. Dreyfus*, 284 U.S. 263. The arbitration agreement was valid under the laws of the State of New York, and the New York judgment must be given full faith and credit, as the district judge below correctly held. His judgment was right and it is therefore AFFIRMED.

APPENDIX B

JUDGMENT

Extract from the Minutes of May 17, 1961

No. 18737.

MIDESSA TELEVISION COMPANY, INC.,

versus

MOTION PICTURES FOR TELEVISION, INC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed:

It is further ordered and adjudged that the appellant, Midessa Television Co., Inc., and the surety on the appeal bond here, The Home Indemnity Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR COMMERCIAL ARBITRATION TRIBUNAL

MOTION PICTURES FOR TELEVISION, INC.

- and -

MIDESSA TELEVISION CO., INC.

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into between the above named parties on June 3, 1954, and having been duly sworn and having duly heard the proofs and allegations of MOTION PICTURES FOR TELEVISION, INC. and MIDESSA TELEVISION CO., INC. having failed to appear at the hearing after due notice by mail, in accordance with the Commercial Arbitration Rules of the American Arbitration Association, as provided in the Agreement above mentioned, Award as follows:

1) MIDESSA TELEVISION CO., INC., hereinafter referred to as MIDESSA, shall pay to MOTION PICTURES FOR TELEVISION, INC., hereinafter referred to as MPTV, the sum of Four Thousand Two Hundred Fifty-one and 51 100 Dollars ($4,251.51).

2) MIDESSA shall pay to MPTV the additional sum of Seven Hundred Fifteen and 67/100 Dollars ($715.67), said sum representing interest from June 15, 1955, on the sum of Four Thousand Two Hundred Fifty-one and 51/100 Dollars ($4,251.51) at the rate of Six Per Cent (6%) per annum to the date of this Award.

3) The administrative fees of this arbitration are to be borne by MIDESSA. Therefore MIDESSA shall pay to MPTV the additional sum of Four Hundred Eighty-eight and 45/100 Dollars ($488.45), said sum representing the administrative fees of this arbitration previously advanced by MPTV.

4) Accordingly, MIDESSA shall pay to MPTV the total sum of Five Thousand Four Hundred Fifty-five and 63/100 Dollars ($5,455.63) in full settlement of the claim submitted to arbitration.

/s/ HENRY W. HOLZMAN

/s/ CHARLES B. SETON

/s/ AMBROSE E. SHEA

Dated: April 3, 1958

APPENDIX D

SUPREME COURT OF THE STATE OF NEY YORK COUNTY OF NEW YORK

In the Matter

of

The Arbitration of Controversies Between

MOTION PICTURES FOR TELEVISION, INC.,

Petitioner

and

MIDESSA TELEVISION CO., INC.

Respondent.

JUDGMENT

Certain controversies existing between the petitioner herein, Motion Pictures for Television, Inc., with an office at 400 Park Avenue, New York 22, N. Y., and Midessa Television Co., Inc., with an office at Midland, Texas, having been submitted to arbitration by the petitioner to Henry W. Holtzman, Esquire, Charles B. Seton, Esquire, and Ambrose E. Shea as arbitrators, to hear and determine, pursuant to the provisions of a certain agreement dated June 3, 1954, and said arbitrators having duly proceeded in the matter and an award having duly been made, signed and acknowledged by all the foregoing arbitrators and the award having been duly confirmed by an order entered on June 18, 1958,

NOW, on motion of Arnold C. Stream, Esquire, attorney for the petitioner, it is

ADJUDGED, that the petitioner, Motion Pictures for Television, Inc., 400 Park Ave., N. Y. C., do hereby recover of the respondent, Midessa Television Co., Inc., of Midland, Texas, the sum of Twenty Thousand Six Hundred Twenty Six and 75/100 Dollars ($20,626.75) with interest thereon from the date of the award, to-wit, April 3, 1958, amounting to $309.00; or the aggregate sum of $20,935.75; and that the petitioner, Motion Pictures for Television, Inc., have execution therefor.

/s/ JAMES MCGURRIN

Clerk

Dated: New York, New York
July 21, 1958.

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FILED
JUL 27 1961
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

OCTOBER TERM 1961

No. 185

MIDESSA TELEVISION COMPANY, INC.,
Petitioner,

v.

MOTION PICTURES FOR TELEVISION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

FRANK BEZONI,
THOMAS O. MCWHORTER,
of the firm of
PERKINS, BEZONI, KIRWAN & MCWHORTER,
1012 Midland Savings Building,
Midland, Texas.

July, 1961

WARLICK LAW, INC.—2263 VALDINA STREET—DALLAS—RI 1-6711

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In the

Supreme Court of the United States

OCTOBER TERM 1961

No. 185

MIDESSA TELEVISION COMPANY, INC.,
Petitioner,

v.

MOTION PICTURES FOR TELEVISION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at *290 F. 2d 203*. There was no written opinion by the Judge of the District Court.

PRELIMINARY STATEMENT

The United States Court of Appeals for the Fifth Circuit has affirmed the judgment and decree of the District Court for the Western District of Texas (entered upon Respond-

ent's motion for summary judgment) which held that the judgment of the Supreme Court of the State of New York upon which Respondent herein sued, is entitled to full faith and credit under Article IV, Section 1 of the Constitution of the United States.

Petitioner has asserted as a ground for the issuance of a writ of certiorari that the New York judgment was obtained by fraud, thus raising anew a factual issue which was disposed of by both of the lower courts, the District Court, in its judgment, saying:

> "* * * The court having considered the pleadings, stipulations and documentary evidence on file, together with such affidavits and arguments of counsel, and finding that they show an absence of genuine issue of any material facts * * *"; (R. 115).

and the Court of Appeals, in its opinion having stated:

> "In addition nothing is stated in Defendant's Answer or otherwise shown which would support a claim of fraud even if that could be gone into. As the stipulated facts and the exhibits set out in the record show, defendant was notified of and given full opportunity to contest the motion of the plaintiff in the New York Supreme Court to amend the arbitration.
>
> "Further, a careful examination of the judgment and the record in respect to the amendment of the arbitration discloses no fact which supports the defendant's claim of fraud." *290 F. 2d 203, 205.*

Respondent seeks to have the Supreme Court take the up anew an issue of fact which has been fully laid to rest by the lower courts which have considered it. Not only is the decision of the Court of Appeals unquestionably correct, but, as will be shown below, no grounds exist for the issuance of a

writ of certiorari herein, since (a) the decision of the Court of Appeals herein does not conflict with applicable decisions of this Court, (b) such decision does not conflict with decisions of any other Court of Appeals, and (c) no substantial question under the Constitution of the United States is presented.

QUESTIONS PRESENTED FOR REVIEW

1. Whether, upon a motion for summary judgment in an action on a mature judgment of a court of a soverign state, where the defendant alleges fraud in obtaining the judgment as a defense, and the District Court, in awarding summary judgment, finds no genuine issue of material fact, and the Court of Appeals unanimously affirms such judgment, the Supreme Court of the United States should review such determinations of fact.

2. Whether in an action on a mature judgment of a court of a sovereign state, which judgment was obtained and entered in accordance with the procedures prescribed by the laws of such state and after due notice having been given to petitioner, such judgment is entitled to full faith and credit and is immune to a collateral attack mounted upon vague allegations of fraud made by petitioner herein.

3. Whether the merits of a mature judgment of a sovereign state must be relitigated at any time that a defaulting party makes a general and nebulous allegation of "fraud" such as appears in this case.

STATEMENT

This is a suit brought in the United States District Court for the Western District of Texas on a mature judgment obtained by Respondent against Petitioner in the Supreme Court of the State of New York.

Since the relevant facts herein can be stated briefly and since they differ in many material respects from the statements and inferences made in Petitioner's "Statement" and since brief examination of the procedures followed by Respondent throughout this litigation will make evident the reasons why certiorari should be denied, it is appropriate to outline these facts at the outset:

1. On June 3, 1954, Respondent and Petitioner entered into two agreements under which the latter was granted a license to exhibit specified motion picture films over its television facilities in Midland, Texas. These agreements, substantially identical in all relevant respects,[1] each contained, among others, the following significant provisions:

> "Any and all disputes which shall arise from this agreement, its interpretation or performance, shall be submitted to arbitration under the current rules and regulations of the American Arbitration Association, and the decision of the arbitrator shall be binding and conclusive upon both parties."
>
> * * * * *
>
> "This agreement shall be construed under the laws of the State of New York."
>
> * * * * *
>
> "This contract is not binding on Motion Pictures for Television, Inc. until approved by its home office and signed or countersigned by one of its officers."

[1]Hereafter referred to as "the contract". See R. 28.

[Plaintiff's Exhibit "p-3", forwarded to the Court of Appeals by Order of the District Court (R. 121).]

2. The contract was honored by the Petitioner for approximately one year (R. 94) but thereafter, in a timely manner, the Respondent claimed its breach by Petitioner for the failure on the latter's part to make the payments required to be made under the contract, and, in conformity with the rules of the American Arbitration Association the Respondent made demand upon Petitioner for arbitration (R. 50).

3. The Petitioner, although it had received due notice of the arbitration hearing (Stipulation, R. 48) failed to make answer or to participate in the hearing.

4. Thereafter, in conformity with the rules of the Association and with the statutes of the State of New York, such hearing was had before three arbitrators on April 1, 1958, the Petitioner having received due notice of such hearing (Stipulation, R. 48, R. 51).

5. On or about April 3, 1958, an award was entered by the arbitrators in favor of the Respondent herein (Stipulation, R. 48; R. 53) and thereafter the Notice of Motion (R. 89) and Petition (R. 91) were filed in the Supreme Court of New York pursuant to *Article 84, Section 1462-A of the Civil Practice Act of the State of New York* (R. 73) and in conformity with the arbitration statutes of that state, seeking modification and correction of the award and leave to enter judgment in the amount of the award, as corrected, with costs.

6. The Notice of Motion and Petition were duly served on the Defendant (Petitioner herein) by mail (R. 106) in accordance with Section 39 of the Rules of the American Arbitration Association (Stipulation, R. 47) by which the parties contracted to be bound, and *Article 84* of the *Civil Practice Act* of the State of New York (R. 56). *Petitioner has never denied receipt of this Notice of Motion and Petition.*

7. The arbitration award was corrected and modified, as prayed, by Order of the Supreme Court of the State of New York (R. 108) directing the Clerk to enter judgment in favor of the Respondent herein.

8. Pursuant to such order, judgment was duly entered in favor of Respondent (R. 83), from which no appeal was taken by Petitioner herein (Stipulation R. 46). It is upon this final judgment issuing from the Supreme Court of the State of New York, County of New York, that Respondent's present action is founded.

9. The summary judgment entered by the United States District Court for the Western District of Texas in favor of Respondent herein, Plaintiffs below, was correctly affirmed by the United States Court of Appeals for the Fifth Circuit.

Petitioner was thus fully aware of the details of the correction of the arbitration award, as urged by Respondent, and was likewise aware of the procedures to be followed under the New York Civil Practice Act, as well as all forms of relief to be urged by Respondent in the New York Court. Nevertheless, for reasons best known to itself, Petitioner chose to ignore the proceeding in the New York Court and made no opposition thereto.

ARGUMENT

Although the Petitioner never clearly states what allegations of "fraud" it urges as a basis for relitigating the New York proceeding, it is quite apparent, from Petitioner's innuendo, that the only "fraud" it could possibly be asserting is in the procedures followed by Respondent to obtain the New York judgment. Thus Petitioner has posed, in its "Questions Presented for Review" various questions, which under

the facts of this case, are essentially hypothetical and irrelevant. Try as Petitioner may, the questions urged upon this Court for review cannot be disassociated from the facts of the case. The record herein speaks for itself and clearly demonstrates (as the District Court and Court of Appeals found) that there was no "fraud".

Still another reason for denying certiorari is that the case, on its facts, is unique and does not present matters of general interest. Finally, any questions of law necessary to the determination of this case involve settled principles of law concerning the full faith and credit clause of the Federal Constitution and the decision of the Court of Appeals conflicts with neither decisions of the United States Supreme Court or other Courts of Appeals.

The Lower Courts Have Resolved the Issue of "Fraud"

Having by deliberate omission failed to present any defense in the arbitration proceeding, and having likewise ignored the action of the New York Court to correct and reduce the award to judgment, the Petitioner seeks to attack collaterally the New York judgment by the device of improvised wholesale allegations of "fraud". When stripped of argumentative and imaginative verbiage, Petitioner's complaint (and its petition for certiorari) seems to devolve essentially into an expression of dissatisfaction with the *New York Civil Practice Act*, and, in essence, charges that the pursuit by Respondent of the remedies provided by the *New*

York Civil Practice Act, and particularly *Section 1462-A* thereof (R. 73), is somehow fraudulent.

Respondent complied meticulously with every procedural requirement of the contract between the parties and the New York Civil Practice Act. It is noteworthy that Petitioner does not presume to charge that due process of law was not accorded it.

Article 84, Section 1462-A of the Civil Practice Act of the State of New York (R. 73) sets out specifically the authority of the Courts of New York to modify and correct an arbitration award under circumstances under which such correction must be made. *Section 1461* of said Act (R. 71) deals with the motion to confirm an arbitration award, making note of the provisions of the Act for modification or correction of the award. *Section 1463* of said Act (R. 71) deals with the notice of a motion to modify or correct an award; and *Section 1464* of said Act (R. 74) deals with entry of judgment upon the granting of an order confirming, modifying or correcting an award. Petitioner received every notice of the New York proceeding required by the laws of that state by which Petitioner contracted to be bound including the Notice of Motion (R. 89) and Petition (R. 91) which latter sets forth in elaborate detail the matters urged to the Court to support Respondent's position that the arbitrators had made an evident miscalculation in their award. The matters urged therein relate to the question of damages which are matters *intrinsic* in the judgment. The measure of damages applied, far from being fraudulent, is hornbook law and is as basic in contract law as *Hawkins v. McGee, 84 NH 114,*

146 A 641. The amount of the judgment obtained is *res judicata* having been conclusively determined by the New York Court. *Morris v. Jones, 329 U. S. 545, 91 L. Ed. 488, 496, 497, 498.* That Petitioner chose not to offer opposition to the aforesaid Notice of Motion and Petition is no reason for this Court to invoke its jurisdiction.

If it not be fraudulent to follow the laws and procedures by which Petitioner contracted to be bound, then Petitioner's Questions Nos. 2 and 3 offer no basis for a writ of certiorari and should be ignored—just as Petitioner, after all due notice, ignored the proceedings of the New York Court. Any other action would constitute a mockery of the full faith and credit clause of the Federal Constitution.

With the possible exception of Petitioner's quarrel with the *Civil Practice Act of the State of New York*, as heretofore discussed, relating to the procedures specified for modifying and correcting an arbitration award, Petitioner is understandably vague and evasive as to its alleged grounds of "fraud" suggested in its Question No. 1. They may be examined by reference to Defendant's Original Answer at R. 10. The first three of such charges at least are matters obviously going to the merits of the previous controversy or are defensive matters which would have been proper only in the New York proceeding. These are not proper matters of inquiry in the present case as they attempt, brazenly, a collateral attack on the New York judgment. The fourth matter set out as a purported allegation of "fraud", as best Respondent can determine, relates to any representation made by Respondent to the New York Court that that Court had

jurisdiction to enter a personal judgment against Petitioner. The basis of the New York Court's jurisdiction has been outlined in the "Statement" of this brief, supra, but the question of jurisdiction is not before this Court.

The "Fraud" Alleged Was Intrinsic

Even if it could be conceded that the allegations of the Petitioner set out any matters sufficiently specific that could be given the dignity of consideration by this Court, a Federal Court of Equity will not grant relief against a judgment obtained by fraud unless it appears that the fraud was *extrinsic, that is, prevented a trial of the issues determinative of the controversy. U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; U. S. v. Beebe, 180 U. S. 343, 45 L. Ed. 563.* Clearly, the matters alleged by the Petitioner are *intrinsic* in nature. The Petitioner had every opportunity to litigate the case in New York, but failed through neglect or deliberate omission to do so and was not prevented from doing so by any act of Respondent.

The Cases Cited by Petitioner Are Not in Point

Petitioner relies, as a basis for jurisdiction of this Court, as well as a basis for review, upon certain dictum contained in *Morris v. Jones, 329 U. S. 545, 91 L. Ed. 488*, supra; and in *Cole v. Cunningham, 133 U. S. 107, 33 L. Ed. 538.* For the determination of this case, no resolution of such language with the dictum or holdings of other cases is necessary in

view of Petitioners' failure to allege any basis of fraud of any substance or legal effect, and its allegations, at best, being defensive matters *intrinsic* in the New York judgment, which, if Petitioner could have asserted the same in good faith, should have done so in the New York forum. However, this Court has repeatedly held as it did in *Hanley v. Donoghue, 116 U. S. 1, 4 (29:535, 537)* where Mr. Justice Gray stated as follows:

> "Judgments recovered in one state in the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of *not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties.*" Citing Buckner v. Finley, 27 U. S. 2 Pet. 592 (7:531); M'Elmoyle v. Cohen, 38 U. S. 13 Pet. 312,324 (10:177, 183); D'Arcy v. Ketchum, 52 U. S. 11 How. 165, 176 (13:648, 653); Christmas v. Russell, 72 U. S. 5 Wall. 290, 305 (18:475, 480); Thompson v. Whitman, 85 U. S. 18 Wall. 457 (21:897).

The Court held similarly in the following cases: *Simmons v. Saul, 138 U. S. 439, 34 L. Ed. 1054, 1062; Wisconsin v. Pelican Insurance Company of New Orleans, 127 U. S. 265, 32 L. Ed 239, 244; Maxwell v. Stewart, 21 Wall 71, 22 Wall 77, 22 L. Ed. 564; Christmas v. Russell, 5 Wall 290, 18 L. Ed. 475, 479.*

The allegations of Petitioner set out no valid or tenable basis for a collateral attack upon the judgment of the New York Court, and the New York Court having had jurisdiction of the cause and of the parties, its judgment is conclusive

as to all matters of controversy between them and is entitled to the same faith, credit and respect in the present case as it was accorded in the state where rendered. *Milliken v. Meyer, 311 U. S. 457, 85 L. Ed. 278; Magnolia Petroleum Company v. Hunt, 320 U. S. 430, 88 L. Ed. 149.*

In view of the foregoing, it is clear that Petitioners' urging of purported conflict of holdings beeween Courts of Appeals as a basis of jurisdiction is of no effect and the cases cited by Petitioner are not to point and are readily distinguishable. Further, Petitioners' argument regarding New York law in its second point does not withstand scrutiny as matters intrinsic in the New York judgment were necessarily concluded by the New York Court and are *res judicata*. The New York Court having had jurisdiction of the cause and the parties, was quite competent to determine the procedural and substantive requirements of the *New York Civil Practice Act*—as it did, conclusively.

Petitioner has not, nor can it, truthfully allege that the procedures prescribed by the New York Statutes were not followed by Respondent meticulously, nor that it did not receive every notification required by the rules of the American Arbitration Association and under the laws of the State of New York by which it agreed by contract to bound. Petitioner has not, nor can it, allege any action taken by Respondent that prevented a trial of the issues of the case in the New York proceedings. It suffices to say that if the purported allegations of "fraud" upon which Petitioner relies

should ever be held sufficient for a collateral attack upon a judgment, there is no judgment conceivable which would be immune to relitigation and which would be entitled, in fact, to full faith and credit under the Federal Constitution.

Had it chosen to do so, the Petitioner could have raised in the New York court all of the matters and purported defects which it now attempts to assert collaterally in this suit on the New York judgment. It could have stayed arbitration proceedings pending a determination before a jury of the validity of the underlying agreements. *Article 84, Sections 1450 and 1451, Civil Practice Act* (R. 60, 62). It could have opposed the confirmation of the result and award by an application to the Supreme Court of New York. It could have obtained a judicial review of the actual conduct and propriety of the proceedings. *Article 84, Section 1462, Civil Practice Act* (R. 72). It could have appealed from the final judgment entered in the Supreme Court of New York, *Article 84, Section 1466, Civil Practice Act*, (R. 75), or have directly attacked the judgment. But the Petitioner did none of these things. Instead, it allowed formal proceedings to be instituted and conducted before an arbitration tribunal; it chose to ignore and failed to participate in the proceedings despite due notice thereof; it allowed the Respondent to present formal proof before the arbitration tribunal and a formal record to be made; it received due notice that the Respondent intended to move to correct and reduce to judgment the arbitration award before the Supreme Court of the State of New York,

but it failed to oppose the motion; and, finally, it allowed the judgment to be entered without protest and the time for appeal to expire. In short, the Petitioner took no step to present its legal contentions or its claims to the arbitration tribunal or to any court until after judgment was entered in conformity with the laws of the State of New York—the very laws which the Petitioner itself agreed to apply and respect in the underlying agreements—and until after suit was brought on the judgment in the United States District Court for the Western District of Texas. All disputes between the parties are *res judicata;* the jurisdiction was properly founded and not subject to collateral attack by reason of the nebulous allegations of the Petitioner, and the judgment of the New York court must be given full faith and credit as required by the Constitution.

CONCLUSION

In an effort to attack collaterally the final New York judgment, the Petitioner has in this case alleged as fraudulent the meticulous compliance with the New York Statutes by which the parties are bound, and has alleged other matters which it would now like to litigate upon collateral attack, having chosen not to do so in a timely manner and in the proper forum. The New York judgment is now final and must be given full faith and credit as required by the Federal Constitution, all matters in relation to such judgment being *res judicata.*

The decision below was clearly correct, and any contrary result, as urged by the Petitioner, would effectively nulify *Article IV, Section 1 of the Constitution*. We respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

FRANK BEZONI,
THOMAS O. McWHORTER,
of the firm of
PERKINS, BEZONI, KIRWAN & McWHORTER,
1012 Midland Savings Building,
Midland, Texas.

July, 1961

CERTIFICATE OF SERVICE

A copy of this Brief for the Respondent in opposition has been mailed to the opposing attorney of record, Mr. W. B. Browder, Jr. of the firm of Stubbeman, McRae, Sealy & Laughlin, P. O. Box 670, Midland, Texas. Such brief was placed in the United States mail and with proper postage thereon on the 26th day of July, 1961.

THOMAS O. McWHORTER